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633093—62——1

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1961

No. 439

UNITED STATES OF AMERICA, APPELLANT

v.

BOWMAN DAIRY COMPANY [1]

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the district court (R. 557–572) has not yet been reported. The prior opinion of the district court, and the opinion of this Court when this case was previously before this Court, are reported, respectively, in 111 F. Supp. 562 and 347 U.S. 514.

JURISDICTION

The final judgment of the district court on remand was entered on February 27, 1961 (R. 572). The notice

[1] Pursuant to this Court's order of January 15, 1962, the United States is filing separate briefs in this case with respect to the two appellees, the Bowman Dairy Company and the Borden Company.

of appeal was filed on April 28, 1961, and this Court noted probable jurisdiction on December 4, 1961 (R. 1286; 368 U.S. 924). The jurisdiction of this Court is conferred by Section 2 of the Expediting Act of February 11, 1903, 32 Stat. 823, 15 U.S.C. 29, as amended.

STATUTE INVOLVED

The pertinent provisions of Sections 2(a) and 2(b) of the Act of October 15, 1914, 38 Stat. 730, as amended, 49 Stat. 1526 (15 U.S.C. 13(a) and 13(b)), commonly known as the Clayton Act, are as follows:

> SEC. 2(a). It shall be unlawful for any person engaged in commerce, * * * either directly or indirectly, to discriminate in price between different purchasers of commodities of like grade and quality, whether either or any of the purchases involved in such discrimination are in commerce * * * and where the effect of such discrimination may be substantially to lessen competition or tend to create a monopoly in any line of commerce, or to injure, destroy, or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them: *Provided*, That nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such purchasers sold or delivered: * * *.
>
> SEC. 2(b). Upon proof being made, at any hearing on a complaint under this section, that there has been discrimination in price or services of facilities furnished, the burden of rebut-

ting the prima-facie case thus made by showing justification shall be upon the person charged with a violation of this section * * *.

QUESTION PRESENTED

Whether a seller who discriminates in price in favor of chain stores, as such, can cost-justify the discrimination simply by showing that the average cost of sales and delivery to all chain stores is lower than the average cost of sales and delivery to all independent stores.

STATEMENT

This is a direct appeal from a final judgment of the district court dismissing a government civil antitrust suit which charged The Borden Company and the Bowman Dairy Company, the two largest dairies in the Chicago, Illinois, area, with illegal price discrimination, in violation of Section 2(a) of the Clayton Act. The district court found that the appellee's prices were discriminatory and constituted "prima facie violations of section 2(a)" (R. 563). It ruled, however, that the companies had established that such discriminations were justified by differences in cost (R. 570) under the proviso to Section 2(a) which permits price differentials "which make only due allowance for difference in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which such commodities are to such [different] purchasers sold or delivered."

On January 15, 1962, on motions filed by the appellees, this Court ordered separate hearings and the filing of separate briefs on the merits for each of the appellees. This brief deals with appellee

Bowman. However, the basic issues are common to both appellees.

THE BACKGROUND OF THE DECISION BELOW

The complaint in this case, filed in 1951, charged the defendants with violating Sections 1 and 2 of the Sherman Act, and Section 2(a) of the Clayton Act (R. 1–20). Insofar as the Clayton Act was concerned, the complaint charged a continuing practice by each of the defendants to sell "fluid milk in interstate trade and commerce to different wholesale purchasers in the Chicago area at prices which discriminate between such purchasers of fluid milk of like grade and quality," that the effect of the discrimination might be to substantially lessen competition or tend to create a monopoly in such sales, or to injure competition between purchasers knowingly receiving the benefits of such competition and those who did not, and that the discriminations in price "have been granted, often secretly, in the form of preferential * * * discounts * * *" (R. 16–17). The complaint further alleged that, unless enjoined from so doing, the defendants intended to pursue the discriminatory practices (R. 17, 18–19).

In 1953, the district court dismissed the complaint after the government had presented its case. *United States* v. *Borden Co.*, 111 F. Supp. 562 (N.D. Ill.). It held that the Sherman Act violations charged had not been proved; and that, although there was proof of price discriminations constituting prima facie violations of the Clayton Act, no injunctive relief was necessary because there was an outstanding injunction

in a private antitrust suit which enjoined the defendants from engaging in such discriminatory practices.

On appeal, this Court affirmed the dismissal of the Sherman Act charges, but reversed the dismissal under the Clayton Act. *United States* v. *Borden Co.*, 347 U.S. 514 (R. 26–31). It held (p. 520) that "the district judge abused his discretion in refusing the Government an injunction solely because of the existence of the private decree," and remanded the case for further proceedings.

On remand, the district judge stated, with respect to the Clayton Act issue remaining, that he conceived his primary duty to be, in the absence of a request for further proceedings, to consider whether injunctive relief was required in the light of the decision of this Court in *United States* v. *W. T. Grant*, 345 U.S. 629, giving due, but not conclusive, consideration to the effect of the consent decree in the private case (*Dean Milk Co.* v. *American Processing & Sales Co.*, No. 49 C 1159 (N.D. Ill.), entered December 3, 1952) (R. 40). The government moved on January 11, 1955, to reopen the record to permit the taking of further evidence, (R. 45–46), on the ground that the *Dean* case had not been effective in preventing further price discrimination by the defendants who were alleged to "have engaged in discriminations in price between different wholesale purchasers of fluid milk of like grade and quality subsequent to the entry of the *Dean* decree" and would continue to do so in the absence of an injunction (R. 46). The court granted this motion by order of April 18, 1955 (R. 47–50).

The case was presented on the basis of stipulations, embodied in pre-trial orders, the depositions of expert witnesses, and written briefs. No testimony was taken before the court. Each stipulation and pre-trial order reserved questions and issues of the weight, materiality, and relevancy of the data and statements in the stipulations (R. 57, 75, 119, 236, 379, 411). The relevant facts of record as to Bowman (which are not disputed except as noted) are set forth below.

THE NATURE OF BOWMAN'S BUSINESS

Bowman is one of the largest dairy companies operating in the Chicago metropolitan area. It accounted for approximately 38 percent of fluid milk and related products sold at wholesale in that area (R. 6). The wholesale customers of Bowman include large grocery chains and "independent" stores. It also sells to "nonstore" customers such as restaurants and institutional bulk buyers (R. 343, 344). The number of stores served varies but in 1955 Bowman was serving an average of 3,270 customers, of which about 2,500 were independent grocery stores, 163 were stores of the Atlantic & Pacific Tea Company and the Kroger chains in the Chicago area, and the remainder were nonstore customers (R. 335, 336, 481). Daily weekday calls were made at each customer store on a driver's route, and product delivery was made from the truck as ordered from the driver by the customer. Butter, eggs, and bulk products[2] in addition to the

[2] "Bulk" products refer to fluid milk products sold, largely to restaurants and industrial users, in much larger containers, for use by the purchaser or resale after being placed in smaller containers by the purchaser.

fluid milk and fluid milk products were carried on the route trucks for daily sale and delivery (R. 330, 333). The milk and other products are delivered by trucks on mixed routes, *i.e.*, they are sold and delivered to both chain and independent stores and to nonstore users from the same trucks, on the same routes, and by the same drivers (R. 343–344). There is, in fact, no physical or functional difference in the instrumentalities used in delivery to the chains and the independent stores. All delivery personnel are employees of Bowman, and Bowman owns and operates the trucks and other delivery equipment. The assignment of stores to routes and the personnel and equipment on routes is wholly unrelated to store ownership.

THE BOWMAN PRICE AND DISCOUNT SYSTEM

Bowman adopted a pricing system for fluid milk and fluid milk products based upon a classification of all grocery stores as either "chain" or "independent." The chain store discount was a fixed percentage discount off of list prices, regardless of quantities or varieties purchased. Independently owned stores received discounts dependent upon volume of monthly purchases by each store, but in no event as high as that granted to chain stores. For purposes of calculating the discount to independent stores the volume was converted to "point" values assigned to each fluid milk product.

During the period from June 1, 1954 through August 1955, Bowman granted the chain stores it served (A & P and Kroger) a flat 11 percent discount from

list prices for fluid milk and fluid milk products, regardless of quantities or "points" purchased (R. 69–70). During this same period Bowman granted the independents a sliding scale of discounts from such list prices based on the quantities (converted to "points") purchased by each store, with a maximum discount of 8 percent.[3] The discounts to the independent stores were based on monthly purchases and were determined after each month. To receive any discount the independent stores were required to purchase at least "one or more converted points of Bowman milk products per normal delivery day" (R. 67).

The June 1954 discount schedule was published by Bowman in a "Resale Store Discount Schedule" (*ibid.*). This document on its face covered all quantity discounts being offered by Bowman to all retail stores irrespective of ownership (*ibid.*). Neither the published announcement nor the schedules contained any statement or indication that higher discounts

[3] The scale of discounts to the independent stores under the June 1954 schedules were as follows (R. 67):

Average converted points per day	*Percent of discount*	*Average converted points per day*	*Percent of discount*
0 to 10	3.0% to 3.4%	80 to 90	5.6% to 5.8%
10 to 20	3.4% to 3.8%	90 to 100	5.8% to 6.0%
20 to 30	3.8% to 4.2%	100 to 110	6.0% to 6.2%
30 to 40	4.2% to 4.6%	110 to 120	6.2% to 6.4%
40 to 50	4.6% to 5.0%	120 to 130	6.4% to 6.6%
50 to 60	5.0% to 5.2%	130 to 140	6.6% to 6.8%
60 to 70	5.2% to 5.4%	140 to 140	6.8% to 7.0%
70 to 80	5.4% to 5.6%		

On August 25, 1954, this schedule was amended by adding thereto (but not publishing) the following additional discounts (R. 68):

Points	*Discount*
150 to 200	7.0% to 8.0%
Over 200	8.0%

would or could be secured by independently owned stores on the basis of their use or non-use of "optional" services related to product delivery or by adoption of methods of payment not involving daily collections by the route drivers.

On May 28, 1954, three days prior to the effective date of the ostensibly general discount schedule of June 1954, Bowman sent letters to The Great Atlantic and Pacific Tea Company and to the Kroger Company, respectively, confirming a discount to the chains of 11 percent of dollar volume effective June 1, 1954 (R. 69–70). Unlike each independent, each chain store was not required to make daily purchases to qualify for any discount. The letter to The Great Atlantic and Pacific Tea Company referred to the "general average" of sales, delivery, customer service, and collection costs for stores "falling outside of the so-called chain store category" as the justification for the greater chain store discount (R. 69). The letter to the Kroger Company simply confirmed its 11 percent discount for the purchase of dairy products in all areas except Racine, Wisconsin (R. 70). Both letters were sent from Bowman's head office in Chicago. The A & P letter was signed by the president of the Bowman Dairy Company and the Kroger letter was signed by its general sales manager.

New discount schedules which resulted in even greater discriminations in price between chain and independent store customers were made effective by Bowman on September 26, 1955 and on January 2,

1956, respectively.[4] Under the September 1955 "Bracket Discount Plan" the independently owned stores were required to take an average of 25 points a day to get any discount, and those with volumes greater than this amount were granted a discount of 2, 3, 4 or 5 percent, depending upon their volume "bracket," with stores taking 250 points or more entitled to the 5 percent maximum. The chains were given a flat 9.8 percent (R. 350–351). Under the January 1956 schedule, the maximum independent discount was 5½ percent (for those taking an average of 355 converted points or more per day) (R. 359), while the chains were given a flat 10 percent (R. 357).

THE PROFFERED COST DEFENSE

A major defense relied upon by Bowman in the court below was that the discriminatory prices in favor of chain stores were justified, under the proviso to Section 2(a), by the lower costs of selling and delivering to them.[5] Under Section 2(b) the burden of showing such cost justification fell upon Bowman.

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[4] In September 1955 there was a period of eleven days between the discontinuance of the June 1954 schedule and the effective date of the September 1955 schedule in which net prices were charged to A & P and a higher net price to the independents, but Kroger bought at a still higher list price (19.32¢ per quart as contrasted with 18¢ for independents and 17¢ for A & P) minus an 11% discount. This was followed by a period of 18 days in which Kroger bought at the same net price as A & P (with no discount) (R. 60–61). During this first period Kroger was in effect paying .2¢ more per quart than A & P.

[5] Bowman also contended that the discriminations in price were not in interstate commerce, that their customers were not in competition with each other, and that the discriminations did

In support of this claim Bowman presented a series of cost studies which are fully set out in the record.[6]

In general the method employed by the cost studies to justify the discrimination was as follows: (1) Bowman first computed the total expenses of each of its distribution divisions and then, assuming that these expenses could be fairly allocated to different customers in terms of delivery time, it used this figure to determine a cost rate per minute for milk truck drivers (R. 274, 309). (2) Bowman then determined the amount of a driver's time required per customer or per quantity of a certain type of milk product to accomplish each of eighteen separate work steps that a driver might be called upon to do (R. 286).[7] (3) It used these figures to determine the total delivery cost to serve independent grocery stores and chain stores at any given volume level (R. 277,

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not injure competition. The district court rejected these arguments and found that the government had established a prima facie case under Section 2(a) (R. 562–563).

[6] The basic Bowman cost study and cost allocations procedures are stated in its "Manual for Establishing and Testing a Store Discount Schedule" (R. 271–310), in its "Discount Schedule Tests" purporting to justify the June 1954 and January 1956 discount schedules (R. 328–348, 357–369) and in its "Test of Bracket Discount Plan", allegedly supporting the September 1955 discounts (R. 349–356).

[7] Of these work elements the calculated time devoted to five were allocated on a per customer basis, five others on a per case basis, three on a basis of a given amount of time for the first case, plus an additional amount of time for each additional unit, one (driving time en route) on the basis of a complicated special formula providing a constant for all stores on the route, and one other on the basis of a given amount of time per glass bottle (R. 286). The other three, which were the decisive elements, are discussed in the text.

278, 283, 284). (4) Simple division by the number of units purchased then gave the cost of delivery per unit at any given volume level (R. 277). (5) the cost per unit of serving the independents at any given volume level was then compared with the cost per unit of serving the chains at the same volume level to determine how great a discount could be granted the chains in excess of that granted the independents under the published Bowman discount schedule (R. 345–347, see R. 278–279, 284).[8]

Only the third of these five steps is of crucial importance to the present case. In allocating the time required for each work step to independents and chains at various volume levels Bowman determined that three of the eighteen work elements would never be chargeable to chain stores and would always be chargeable to independent grocery stores. These three "work elements" require special notice for they constitute the sole explanation of why Bowman gave

[8] This comparison process (set out in Schedules 4–6 of Bowman Ex. 14, R. 345–347), involved for both chains and independents adding the "platform" cost of the milk to the calculated delivery cost per quart at any volume level and subtracting this figure from the list price to secure a "maximum margin" available for discount purposes. From this margin figure for the independents, expressed as a percentage of list price, was then subtracted the percentage rebate for that volume of purchases to secure a so-called "gross margin". Subtracting this gross margin from the maximum available percentage margin for chains at the particular volume level gave the maximum discount which Bowman claimed it could give the chains (see R. 278–279, 284).

different discounts to independent stores and chain stores taking the same volume of Bowman products.[9]

First, Bowman charged *all* independent stores but *no* chain stores .033 minutes per unit or point of milk for so-called "optional customer services" (R. 272, 286). These were defined by Bowman as "some optional delivery services that the driver may be requested to do, such as deliver the order inside, place the containers in a refrigerator, rearrange containers so that any product remaining unsold from yesterday will be sold first today, leave cases of products at different spots in the store, etc." (R. 272, 275 and 292).[10] Bowman admitted that not all independents availed themselves of these services (R. 272, 275), but introduced no figures into the record to show what percentage of the independents utilized the so-called customer services. The government, in rebuttal, introduced evidence, based upon Bowman's 1949 studies of driver time on the 55 routes of its Elston Division, which showed that of the 687 independent stores on

[9] Despite the differing methods of calculating the time to be assigned to each of the other fifteen work elements, they were not allocated to the chains in any manner different from that in which they were allocated to the independents. While they account for the major portion of the calculated total cost per point of serving any Bowman customer at any particular volume level, no distinction between independent and chain stores at any volume level results from this part of the allocation.

[10] While Bowman admitted that "requests vary widely and there is no standard set of options" (R. 276) it stated that "any movement of merchandise beyond a point just inside the store door is considered additional service" (*ibid.*).

these routes, 224 or 32.6 percent took customer services on neither of the days of the study and 46 more, or 6.7 percent took such services only on one of the two dates (R. 480).

The other two work items charged only to independents involve the time and expense of daily cash collections and the related item of delays in collection. These were charged on the basis of a fixed amount of time (1.19 minutes and .13 minutes respectively) per each "cash customer" per day (R. 286). The charge was made to all independent stores and to no chain stores (R. 277–278, 303–330). The basis for this distinction was that "most store customers pay the driver in cash daily, rather than paying by check monthly or semi-monthly" (R. 272, 275). On the other hand, "central billing" on a credit basis was part of the "arrangement" made with the chains (R. 276). However there are no figures in the record detailing what percentage of the independent stores actually paid for their purchases by daily cash collections or whether those who did not were large or small purchasers.

The crucial significance of these three items was recognized by Bowman itself. It explained in its "Manual for Establishing and Testing a Store Discount Schedule" (R. 271, 278) that:

> * * * [T]he same method of calculation [was] used to establish the maximum available margin for chain stores [as for independent stores] but the following elements are not included in the regular services [for chain stores] and are omitted from the total delivery times (see Schedule 2A) [R. 303].

Customer service
Collect
Delay to collect

Due to the omission of these elements, the maximum margin available to chain stores is greater than that available to independents * * *. [Emphasis added.]

As worked out in Exhibit 14 (R. 328–348), the asserted justification of its June 1954 discount schedule, Bowman purported to find that the chain discount of 11 percent was justified for all volume levels over a 180-point per day average.[11] Calculations based upon the same principles also indicated justification for the discount differentials between chains and independents under the September 1955 (R. 349–356) and January 1956 (R. 357–369) discount schedules. In fact, the greater discriminations between the chains and independents under these latter two discount systems were only justified through raising the cost per route minute from 18.2¢ to 18.5¢ (compare R. 345–346 with R. 364–365)[12] and by a change in the price justification formula, not acknowledged in either Bowman Exhibits 15 or 16, providing for an additional differential between the chains and the independent stores allegedly "to reflect the differential proportion of fiber and glass containers between chain and independent stores" (R. 437–438, see R. 438). As a

[11] At all volume levels between 40 points a day and 160 points a day chain discounts of between 9 percent and 11 percent were allegedly justified.

[12] In its Trial Brief below (p. 18–19) Bowman stated this increase was due to the fact that "it was more expensive to operate in the winter months."

result of these two changes the schedules introduced to justify the January 1956 discounts showed a decrease by about 25¢ in the calculated chain delivery cost per point at volume levels above 100 points per day (Compare R. 346 with R. 365) while the delivery costs per point to the independents at these levels showed an *increase* of approximately .03¢ (Compare R. 345 with R. 364).

The government, in a rebuttal pretrial order, introduced expert testimony (R. 411–513) as well as additional evidence challenging a number of the premises upon which the Bowman cost studies were based. In its post-trial brief and reply brief, the government argued these points as well as attacking the basic invalidity of any classification based upon an allocation to all independents but to no chains of the costs of optional customer services and cash collections (Government's Reply Brief (not printed), pp. 18–26, see R. 569).

THE DECISION OF THE DISTRICT COURT

In an opinion which did not distinguish between the Bowman and Borden cost studies, the district court held that the Bowman studies sustained its claim that its discriminations in price, which "constitute prima facie violations of Section 2(a) of the Clayton Act" (R. 563) were cost-justified. The court did not undertake any detailed analysis of the Bowman cost study or the government's objections thereto. Instead, adopting "a liberal approach to cost justification studies" (R. 563), the court found (R. 570):

> * * * [D]efendants have each made a bona fide effort to allocate their costs between different

> types of wholesale customers, and that such cost allocation is the sole reason for the alleged price discrimination. I find that the cost studies provide an adequate justification for the difference in prices described above in defendants' published discount quotations.

Although the court recognized that "the studies are imperfect in some respects," (*ibid.*) it rejected the government's challenges to their validity, since "any such cost studies, no matter with how much care and skill they are prepared, are bound to be imperfect" (*ibid.*). The court noted the "seemingly arbitrary nature" of the basic classification of Bowman's customers into chains and independents (R. 569), but concluded that "this mode of classification is *not* wholly arbitrary—after all, most chain stores do purchase larger volumes of milk than do most independent stores" (R. 570, emphasis in original).

Finally, the court stated that it had not given its "stamp of approval to all pricing policies and practices revealed by the evidence * * *. These policies and practices have in many instances been imperfect" (R. 572). But it held that if it were to enjoin such practices it would lead to its complete regulation of this phase of the milk industry and it "would continually be called upon to pass judgment on the pricing practices of these defendants" (R. 571). Finding "such a course is impractical and unwarranted," it stated that "on the basis of the evidence presented" (*ibid.*), the government "is in no way prohibited from bringing these policies and practices to the attention of the Federal Trade Commission, which is, as

the Supreme Court has pointed out, a more appropriate tribunal to grant effective relief, if it be warranted" (R. 572).

SUMMARY OF ARGUMENT

The Bowman Company adopted pricing policies under which its independent customers received percentage discounts off list price, the amounts of which depended upon the volumes of their purchases, while its two chain store customers received higher fixed discounts, not dependent upon their volumes of purchases. In all cases the chain stores were afforded discounts almost half again as large as those which any independent could qualify to receive. Bowman attempted to justify the *prima facie* violations of Section 2(a) of the Patman Act, which these discriminations were found to involve, by cost studies which were also based upon the classification of its customers as either chains or independents. This attempted cost justification does not meet the minimum requirements of the Robinson-Patman Act because the distinctions in Bowman's methods of sale and delivery to its wholesale customers upon which its studies were based, as well as any cost distinctions flowing from the different quantities of Bowman's products which these customers purchased, were demonstrably unrelated to whether a particular customer was a chain store or an independent.

I

The Robinson-Patman Act amended Section 2(a) of the Clayton Act so as to prohibit any seller in interstate commerce from discriminating in price

between purchasers where competition might be adversely affected unless the price differential makes only due allowance for certain described cost differences. Both the clear wording of the amendment and the legislative history of the provision indicate plainly that a price differential can only be justified by a showing of a cost difference of approximately equal amount which flows directly from differences in the method or quantity of sales involved in dealing with the purchasers.

Where a seller deals with a very large number of customers practical considerations may make appropriate the establishment of defined classes of customers and the promulgation of prices for each class which reflect the cost savings necessarily involved in dealing with its members. Unless the classes of favored or disfavored customers are appropriately defined, however, the resulting price structure may lead to substantial and unjustifiable discrimination against individual members of the disfavored class of customers and may result in the destruction of price competition among the seller's customers.

The minimum requirements for an appropriately defined class of customers is that membership in a favored class be solely determined by the presence or absence of those differences in method or quantity of dealing which caused the principal cost savings accruing to the seller. If membership in a favored class of customers is determined either (1) in terms unrelated to differences in method or quantity of dealing or (2) in terms of differences in method or quantity which fail to explain the alleged difference in cost of dealing with the individual members of the class, its use

to determine or to justify prices will necessarily result in an unjustifiable discrimination against purchasers whose quantities or methods of dealing involve the same substantial cost saving factors which are involved in the low price granted the favored class.

II

The Bowman Company, both in establishing its pricing policies and in attempting to cost-justify them, created two classes of customers, chain stores and independents. But the two cost-saving methods of sale and delivery upon which it based its classification in the court below admittedly did not involve factors confined to the chains; some independent stores also utilized the less costly methods. Similarly, any cost savings accruing to Bowman as a result of quantity purchases were not related to whether a particular purchaser was a chain store or an independent. For the record, although silent on the volume of purchases by either of Bowman's chain store customers considered individually, discloses that some independents had greater weekly purchase volumes than the combined average for the chain stores. Since Bowman's classification does not depend upon any uniform or necessary differences in the quantities or methods of dealing of chain stores and independents, it results in an unjustifiable discrimination against the larger independent stores which, for all that appears in the record, use the same method of delivery and payment adopted by the chain stores. Moreover, Bowman's classification prevents any independent from chang-

ing its quantity or method of dealing in order to obtain a price which is comparable to that charged a competing chain store. There can be no doubt that the Robinson-Patman Act was intended to and does forbid any such discrimination in price between individual purchasers who are served by identical methods and quantities of sales and delivery.

III

The question of the appropriateness of Bowman's classification of customers is properly presented on this appeal. Moreover, contrary to the belief of the district judge, adequate equitable relief would not involve a continuing and complex regulation of one segment of the economy, but would require only the simplest form of injunction—a prohibition of Bowman continuing to charge different prices to different classes of customers on the basis of form of ownership or on any other basis not substantially related to the cost savings realized in dealing with the members of the class.

ARGUMENT

Beneath a mass of data, tabulations, charts, and analyses designed to prove the cost savings which are said to justify Bowman's policy of applying a different discount schedule to chain grocery stores from that applied to independents, lies one undisputed fact and one clear question of law. The undisputed fact is that the discount schedule applicable to chain grocery stores arbitrarily assumes and gives effect to three items of cost savings in methods of delivery and payment which are not given effect in determining the

discount for an independent grocery store even though the methods of sale to and payments by the independents actually involve the same methods of delivery and payment and therefore result in identical cost savings for identical reasons. The question of law is whether the resulting greater discount to a chain store operating identically to an independent can be "cost justified" by treating the chain store and the independent as members of different classes of customers although they are individually alike in every way relevant to costs.

I

THE STATUTE BROADLY PROHIBITS ANY PRICE DIFFERENTIAL BETWEEN CUSTOMERS THAT IS NOT DIRECTLY AND IMMEDIATELY RELATED TO A SIMILAR COST SAVING

Section 2(a) of the Clayton Act, 15 U.S.C. 13(a), as amended in 1936 by the Robinson-Patman Act, 49 Stat. 1526, prohibits a seller engaged in commerce from discriminating, either directly or indirectly, in price between different purchasers of commodities of like grade and quality, where the effect of such discrimination "may be substantially to lessen competition or tend to create a monopoly in any line of commerce or to injure, destroy or prevent competition with any person who either grants or knowingly receives the benefit of such discrimination, or with customers of either of them." It provides, however, that:

> * * * nothing herein contained shall prevent differentials which make only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods

> or quantities in which such commodities are to such purchasers sold or delivered: * * *

The cost defense proviso of the amended Section 2(a) was a substitute for a proviso of the original Clayton Act which had made a mere difference in the quantity of the commodity sold a defense to a charge of price discrimination. 38 Stat. 730. The new language was deemed to be of "great importance," for while it permitted "the adoption and use of more economic processes of manufacture, methods of sale, and modes of delivery," it "also limits the use of quantity price differentials to the sphere of actual cost differences. Otherwise such differentials would become instruments of favor and privilege and weapons of competitive oppression." H. Rep. No. 2287, 74th Cong., 2d Sess., p. 9; see S. Rep. 1502, 74th Cong., 2d Sess., p. 5.

The reconciliation of policies accomplished by the statute's prohibition and its cost defense is clear. Competition was to be protected by the prohibition of price discrimination, yet customers were not to be denied by the statute the benefits of the economies and efficiencies that were uniquely involved in sale and delivery to them. The limits of a cost defense follow logically from this reconciliation of purposes. The Senate Report indicated that the bill "limits the differences in cost which may be honored in support of price differentials, to those marginal differences *demonstrable as between the particular*

customers concerned in the discrimination" (emphasis added). It added that the bill was designed:

> * * * to leave the test of a permissible differential upon the question: If the more favored customer were sold in the same quantities and by the same methods of sale and delivery as the customer not so favored, how much more per unit would it actually cost the seller to do so, his other business remaining the same? * * * [S. Rep. 1502, 74th Cong., 2d Sess., p. 6.]

In sum, a price differential can only be justified by a showing of a cost difference of approximately equal amount which flows directly from the method or quantities involved in dealing with the particular purchaser.

II

THE USE OF CLASSES OF CUSTOMERS IN ESTABLISHING A COST JUSTIFICATION FOR DISPARATE PRICES IS CONSISTENT WITH SECTION 2(a) ONLY IF THE CLASSES ARE CREATED AND DEFINED IN TERMS OF THE SUBSTANTIAL COST FACTORS INVOLVED IN DEALING WITH THE MEMBERS OF EACH CLASS

Read literally, the language of the statute and of the Senate Report seems to forbid any differential pricing between any two customers unless that difference is individually justified by a showing of a similar difference in cost of manufacture, methods of sale, or delivery between the same two customers. As a matter of practical necessity, however, when a seller deals with a very large number of customers, he cannot be required to establish different cost-reflecting prices

for each customer. The seller must be permitted to establish appropriately defined classes of customers and to promulgate prices for each class which reflect the cost savings necessarily involved in dealing with that class.

It has therefore become accepted practice for sellers to establish prices and, as a correlative, to cost-justify discriminatory prices by a two-step process. First, the seller establishes appropriately defined classes of customers. Second, the seller attempts to prove that its quantities or methods of dealing with each of these classes differ in ways that result in a cost difference similar in amount and direction to the difference in price charged the classes. However, the use of classes of customers need not be and, of course, should not be an excuse for treating differently any two or more customers who deal with the seller in the same quantities and with the same methods. The mandate of the Robinson-Patman Act remains that a difference in price is not cost-justified unless it makes "only due allowance for differences in the cost of manufacture, sale, or delivery resulting from the differing methods or quantities in which" the goods are sold. And no difference in cost can result from identical methods or quantities of dealing.

Unless a seller carefully and appropriately defines the membership of favored and disfavored classes of customers, an apparently justifiable price structure may result in substantial and unjustifiable discriminations against individual members of the disfavored classes of customer and in the destruction of price

competition among the seller's customers. Recognizing these dangers of discrimination inherent in improper categorization of customers, the Federal Trade Commission has, in a series of cases, established the requirement that the individual purchasers assigned to any one group for cost-justification purposes must be substantially related in terms of those factors which determine the cost of manufacture, delivery, or sale. See *Curtis Candy Co.*, 44 F.T.C. 237, 267–268; *International Salt Co.*, 49 F.T.C. 138, 153–155; *Champion Spark Plug Co.*, 50 F.T.C. 30, 43; *Thompson Products, Inc.*, 3 Trade Reg. Rep. (FTC Complaints, Orders, Stipulations 1959–1960) ¶ 27,841. While the enforcement of the outer limits of this requirement of a price class which is homogenous in terms of significant cost factors involves the exercise of the judgment and discretion of the trier of facts, recognition of the minimum content of the requirement involves a matter of law which can be derived from the wording and purpose of the statute.

This minimum requirement can be stated in either of two very similar ways: (1) The Robinson-Patman Act, which was designed to prevent price discriminations between similarly situated customers, does not authorize the use of classes of customers to justify price differentials unless membership in a favored class of customers is available to any customer whose method of dealing with the seller involves the identical cost-saving aspects which justify giving a special price to the favored class. Otherwise a defense

against one price discrimination becomes an authorization for another discrimination. (2) The granting of lower prices to a favored class of customers necessarily involves price discrimination unless the membership of that class is determined solely by the presence of significant cost-saving elements in dealing with the members of the class. For to define the membership of a favored class of customers in any other way is necessarily to authorize an unjustifiable discrimination between the members of that class and other customers who deal in the same cost-saving way that is recognized in the class price. No requirement of convenience justifies a seller in using a classification system which, from the beginning, authorizes an unjustifiable discrimination between customers who deal alike with the seller in all material respects.

There are thus two considerations of major importance to the purposes of the Robinson-Patman Act which require a rule which permits classifying customers for purposes of cost justification only where the seller uses open-ended classes of customers defined *solely* in terms of significant cost factors:

(1) Only the definition of favored classes of customers in terms of cost-saving aspects of the method or quantities of dealing with each class provides a minimum guarantee that the selection of classes will not be used as a device to accomplish the very type of price discrimination that the Act was intended to forbid. A simplified example can best illustrate the harm of departure from this standard. Suppose a seller, X,

incurs the following costs per unit sold in dealing with nine different customers:

Customer	Cost-saving factor	Cost of delivery per unit sold
A	Absent	14¢
B	Absent	13¢
C	Absent	12¢
D	Absent	10¢
E	Present	6¢
F	Present	4¢
G	Present	4¢
H	Present	5¢
I	Present	7¢

If X, for purposes of cost justification, divides his customers into two groups, A through G in one group and H and I in the other group, a price difference of 3¢ between the two groups will superficially appear justified, for the average cost per unit sold of delivery to customers A through G is 9¢, while the average cost of delivery to H and I is 6¢. If the process of classification is accepted, so is a price three cents lower for I than for E, F, or G, when in fact sales to F and G are 3¢ cheaper per unit and sales to E are 1¢ cheaper.

It is important to note that in this hypothetical example, as in the present case, the seller, X, might well be able to establish that there is a cost-savings factor (such as a particularly economical method of delivery) which is present in dealing with H and I and absent in dealing with the *majority* of customers A through G. If this should be accepted as a sufficient

showing of the reasonableness of the classification, then X will be permitted to charge E, F, and G 3¢ more per unit than H or I—even though the identical cost-savings factor is present in sales to all five customers. This would be discrimination *not* justified by the Act. Only if X is required to define its categories of customers in terms of the presence or absence of factors substantially relevant to the determination of X's cost, will X be effectively prevented from discriminating between similarly situated customers.

(2) Only a definition of classes of customers in terms of the cost factors which are present or absent in the parties' dealing avoids permanently freezing a competitive inequality at the customer level, to the inevitable detriment of competition. Even if it were shown that there had always been a certain cost saving factor in dealing with each member of a particular group of customers—for example, chain grocery stores—compared to the customary methods and costs of dealing with all members of another group such as independents, the creation of a continuing price differential based on whether or not a grocery store belongs to a chain rather than on the presence or absence of the cost-saving factor would be contrary to the requirements of the Robinson-Patman Act. An independent store which found itself unable to compete with a neighboring chain store would be effectively precluded from obtaining the lower price paid by the chain store even if it undertook to change its method of dealing so that its supplier could realize

the same cost savings as in dealing with the chain store.

Only a definition of a price class in terms of the services its members require provides a framework within which a disfavored customer can, by changing his method of operation, obtain the lower prices available to his competitor. Without such an open-ended method of classifying customers a supplier's disparate prices will inevitably freeze out any future attempt at price competition between members of different classes of customers.

One final point should be noted because of its relevance to the companion case of *United States* v. *Borden Co.*, although it is unnecessary to the present argument. In contending that any classification of customers for purposes of the determination or justification of a price differential must be in terms of differences in methods or quantities of dealing, we have not meant to suggest that customers can properly be classified in terms of a difference in method or quantity of dealing which is of only marginal importance to, and in no sense truly justifies, the different costs involved in dealing with a particular class. To the contrary, a class of favored customers must be defined in terms of cost factors which substantially explain and justify the amount of the lower cost charged the favored class. Since Bowman did not define its classes of customers in terms of cost factors at all, this point requires no further attention in the present brief.

III

BOWMAN'S CLASSIFICATION OF CUSTOMERS AS CHAINS OR INDEPENDENTS WAS NOT BASED UPON NECESSARY DIFFERENCES IN THE METHOD OR QUANTITY OF SALES OR DELIVERY BETWEEN THE CUSTOMERS SO CLASSIFIED AND IS THEREFORE INVALID

If the general principles we have outlined above are sound, there can be no doubt as to the invalidity of Bowman's cost justification. For its basic classification of all purchasers as chains or independents bears no necessary relationship to cost differences in dealing with the members of the two groups arising out of any difference in method of delivery or sale or quantity of purchases. There was thus no basis for using the classification for an allocation of costs.

A. As indicated in the Statement, *supra*, in the court below Bowman justified its disparate prices solely on the ground of a distinction in methods of sale and delivery stemming from the nonuse by the chains of optional customer services and their operation, unlike the majority of the independents, on a credit rather than on a cash payment basis. But, as Bowman admitted with regard to both of these factors, there were independent stores which operated on exactly the same basis as the chains (see Statement, pp. 13–14). Accordingly, Bowman was not justified in charging the costs of these activities (which fully accounted for the difference in discounts) to every independent store. If these two factors in fact formed the sole basis of the differences in Bowman's

costs of doing business with its various customers at any given volume level, the costs of these two activities should have been allocated among four classes of stores (all of which might have included some independents), namely:

(1) Purchasers using both the costly method of payment (daily cash payments to the truck driver) and the costly method of delivery (in-store services).

(2) Purchasers using only the costly method of payment.

(3) Purchasers using only the costly method of delivery.

(4) Purchasers using neither service.

B. In its Motion to Affirm or Dismiss (p. 14) Bowman attempted to shore up its classification of purchasers as either chains or independents for purposes of cost justification, by arguing that the distinction can be justified and the discounts explained on the basis of quantity savings in dealing with the chain stores. This belated effort cannot assist Bowman. For if quantity is to be the basis of a differential in the discounts offered different purchasers, then any classification of customers designed to reflect quantity savings for cost-justification purposes must be in terms of quantity of purchase and not ownership so as to make allowance for the large independents which purchase as much or more than the average chain store.

Bowman suggests (Motion to Affirm or Dismiss, p. 14) that, although its higher discounts to the chains were not in terms based on quantity (since the chains were not required to take any volume of milk to

qualify for the 11% discount), and although its cost-justification study was also not constructed on this basis (since its schedules show that the chains were entitled to a higher discount at any given quantity level), its discount differentials between the chains and the independents were nevertheless justified on a quantity basis. It points to the fact that the average independent store took only approximately 58 points of milk per day, with 98% of the independents taking less than 200 points per day (see R. 481, 526–529). On the other hand, the average chain store (considering A & P and Kroger together) purchased 500 points per day (R. 482).

The error in this argument is two-fold: (1) There is no basis for considering A & P and Kroger as one purchaser. (2) There is no basis for averaging the volumes of the independents, thus requiring the larger independents to be compared with their chain rivals on the basis of the average volumes for all independents rather than on the basis of their own volumes of purchases.

Aside from three chain stores utilized by the government to prove its prima facie case (R. 62–63), there are not figures in the record by which the volumes of purchases of independent stores may be compared with the volumes of particular stores of either the A & P or Kroger chain or even the average store volume for either of those chains.[13]

[13] Among the contentions made by the government below, but not resolved by the district court, was the argument that where an independent store is in competition with a particular store of a chain taking a volume of purchases less than the average for that chain's stores, the independent is entitled to secure a discount proportional to the costs of serving it

There is thus no justification for considering A & P and Kroger as if they were the same purchasers. If, for example, it turned out that the Kroger stores averages 600 points and the A & P stores only 400 points, it would clearly be improper to give the A & P chain a quantity-based discount differential over the independent stores based upon a 500 point daily average of the A & P and Kroger stores.

More important, there can be no justification for treating the independent stores for purposes of quantity discounts on the basis of average volume of the entire group. A sampling of one-third of the independent stores served by Bowman shows (R. 481) that in this group alone there were 12 independent stores with daily purchases from 200 to 400 points (averaging 275 points) and 4 stores with daily purchases of over 400 points. This latter group averaged 536.38 points, as contrasted with a "chain" average for A & P and Kroger of 506.48 points (R. 481, 482). Two of these independents averaged 648 points between them, almost 150 points more than the chain average. Despite the substantial volumes purchased by these stores and although Bowman made no showing that its method of dealing with these stores differed from that used with the chain stores in any respect relevant to cost, these inde-

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as contrasted with the costs of serving the individual chain store, rather than a discount proportional to a higher "average" cost of serving all stores in the chain. The government is willing to assume, for purposes of this argument, that the proper volume figure to be used in comparing a chain with its independent competitors is the average volume purchased by the stores of that particular chain.

pendents were at all times restricted to a maximum discount on purchase price which was 3% less than the chain stores were allowed.

Even if Bowman could show on remand what it did not undertake to show below—that all the large independent stores used one or both of the costly customer services—a pricing system like Bowman's, which would in no event allow an independent to obtain the same discount as a chain store, would still violate Section 2(a) of the Robinson-Patman Act. Bowman's system makes it impossible for an independent grocery store to enter into price competition with a neighboring chain store, for regardless of the volume of milk products it takes and regardless of its attempts to change its methods of dealing with Bowman so as to assure Bowman all possible cost savings, it could not obtain Bowman's commodities at a price comparable to that available to any chain store. Under the Bowman price-discount system there is no way that an independent store can enter into price competition with a chain store on equal terms.

There is thus an unexplained actual discrimination of substantial importance between Bowman's large independent customers and its chain store customers, and there is a pricing system which requires continuing anti-competitive pricing even if an independent customer deals with Bowman in a way identical to that used by a chain store with which it hopes to compete in price. Bowman justifies the creation of separate categories for chain stores and independent stores on the ground that, although they are not defined in these terms, the categories in fact differ in average

volume and in normal method of payment and delivery. The short answer to this is that if any one of the three cost variables or any combination of them justifies a certain discount to chain stores, it must also justify a similar discount to independent stores operating in a similar fashion. There is no great business difficulty in establishing open-ended categories of customers, the benefits of which are available to whoever deals in certain cost-saving ways. Even if there were substantial inconvenience in establishing such categories, it is an obligation the Robinson-Patman Act imposes, for it is a necessary condition of keeping open the avenues of price competition between the customers of a wholesale distributor.[14]

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[14] A further, unrelated, objection to the Bowman study made by the government below (R. 251) was directed to Bowman's basic assumption that the total expenses of its distribution division, including such important items as auto depreciation, office salaries and wages, personnel benefits, advertising, and bottle expenses (see R. 309, 341) could be allocated between the chain and independent stores on the basis of calculations of the time spent by the milk drivers in delivering milk to the two types of customer.

There is a serious question as to whether many of these "overhead" items are properly part of the cost study at all. For, as the House Report on the Robinson-Patman Act makes clear, permissible cost differentials may include "differences in overhead where they can actually be shown as between customers or classes of customers concerned, but it [the language of the proviso] precludes differentials based upon the imputation of overhead to particular customers, * * * where such overhead represents facilities or activities inseparable from the seller's business as a whole and not attributal to the business of particular customers * * *." (H. Rep. No. 2287, 74th Cong., 2d Sess., p. 10; see S. Rep. No. 1502, 74th Cong., 2d Sess., p. 6.) But assuming that some or all of these charges were directly connected with cost differences in the method of sales or deliv-

IV

THE QUESTION OF IMPROPER CLASSIFICATION OF CUSTOMERS IS PROPERLY PRESENTED IN THIS APPEAL

In its Motion to Dismiss or Affirm Bowman contended that the question presented by the government on this appeal is not properly before the Court. Specifically Bowman alleged that since the government had made out its *prima facie* case of price discrimination on the basis of an analysis of some nine competitive stores on two routes (including two A & P stores and one Kroger store), it was required to cost justify only the differentials in discounts to these particular stores. Thus, the issue on appeal assertedly could not be whether Bowman had cost justified "*prima facie* * * * unlawful price discrimination in favor of all chain stores and against all independents" (Bowman Motion to Affirm or Dismiss, pp. 10–11). Bowman also contended (*id.* at 6–7, 11–12) that the government had expressly limited its

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eries to the chains on the one hand and the independents on the other, there was no demonstrable basis for allocating such expenses on the basis of driver's time on route. On the contrary, as the government contended (and as the Borden study recognizes) at most only the driver's wages (which made up less than one-third of the expenses allocated (R. 341)) should have been allocated on this basis.

Bowman, it should be noted, stipulated that if the government was correct in this argument, its cost justification would fail (R. 251). The district court, however, did not resolve the issue and it is impossible to determine whether the court agreed with Bowman, or merely felt, contrary to Bowman's stipulation, that this was one of the ways in which the cost studies were "imperfect", but that this imperfection was not decisive since Bowman had made a bona fide effort to allocate its costs between different types of customers (R. 569).

objections to Bowman's cost studies to four technical objections, upon which subsequent evidence was developed, and that none of these four objections related to the issue of improper classification of chains and independents now raised on appeal.

A. The first contention can be quickly disposed of. The government, as Bowman stated, did make out its prima facie case by an analysis of the effects of the discriminations between the chain and independent stores in the nine-store, two-route example for which the facts were set out in the November 4, 1955 Supplemental Pre-Trial Order, and its attached schedules and exhibits (R. 57–74, see also 236–244, 412–414, 447–461, 520–521). It was not, however, making out a prima facie case only as to these nine stores but rather adducing proof with respect to these nine stores to support its prima facie case as to discrimination with respect to the discount schedules applicable to all of the stores served by Bowman. The district court made this clear in its opinion, stating that the government had "demonstrated" by its analysis of the nine stores "that a price discrimination exists as against the independent stores under applicable discount quotations" of Bowman (R. 561), and subsequently found that "the published discount quotations of defendants, which on their face show discriminations between the defendants' wholesale customers, constituted prima facie violations of Section 2(a) of the Clayton Act" (R. 563). Nothing in the opinion indicates that the prima facie case which the court found had been established was limited to the nine stores used for purposes of analysis.

Moreover, any contention that the Bowman cost studies were limited to, or intended to be limited to, a justification of the discriminations found to exist with respect to these nine stores is negated by examination of the studies (R. 271–310, 328–369) and the Pre-Trial Order (R. 236–258) to which these studies are exhibits. Thus, Bowman's witness Bergfeld testified that the basic manual for establishing and testing a variable discount system (Ex. 4, R. 271–310) was developed in December 1952 for application by Bowman generally (R. 247–248) and that the three test reports (Exs. 14, 15 and 16, R. 328–369) were "designed to determine the equity of the discount schedule when compared to the discounts or prices granted to the various corporate chains and also to determine the equity of the classification of the sales to independent stores based upon their volume of purchase" (R. 248–249). Of the four exhibits which make up the Bowman cost study only one, Exhibit 14, the record of tests purporting to prove the justification of the June 1954 discount schedules (R. 328–348), specifically refers to the nine stores utilized by the government in proving its prima facie case. This exhibit contains two schedules purporting to justify the discrimination in discounts provided these nine stores according to the Bowman formula plus the other stores on the two routes (R. 343–344, see also 329–333). But in recognition of the general nature of the problem the exhibit also contains a purported test justification of the discounts with respect to all of the A & P and Kroger stores (R. 333–336). Detailed schedules (R. 345–347) filed in support of this latter analysis pur-

port to determine discount schedules for all independent and chain stores at various volume levels, as well as to establish the maximum discount at various volume levels for the chain stores in the light of the schedule of rebates applicable to all independents as of June 1954.

B. The argument that the United States waived its right to argue the basic invalidity of the Bowman cost studies and instead limited itself to four technical objections is equally without substance. It rests upon statements in paragraphs 28, 29 and 31 of the Supplemental Pre-Trial Order as to Bowman of December 23, 1957 (R. 236–258) that the government "makes three objections to the *method of testing* discounts described in the basic manual (Bowman Exhibit 4) and employed in the March 1955 tests (Bowman Exhibit 14)" (R. 250, emphasis added),[15] that the second of these objections was "plaintiff's principal objection to the cost defense offered by the defendant Bowman Dairy Company" (R. 251) and that:

> Except for the foregoing three objections, and one further objection to the test of the store discount plan effective January 2, 1956 (Bowman Exhibit 16) based on its analysis of

[15] These three objections were (1) to the adequacy of the sample used in developing standard time allowances, (2) to the allocation of the entire cost of Bowman's distribution division on the basis of driver's time (see p. 36, *supra*, n. 14) and (3) to the failure to consider that part of the expense of the Bowman central office related to sales problems (much if not all of which would have to be allowed to the chains (R. 250–251)).

sales of glass and fiber containers, which objection will be set forth in the plaintiff's rebuttal material, plaintiff has no objection to the validity of the cost studies submitted by the defendant Bowman to justify the differences in prices and discounts to Bowman store customers identified in the plaintiff's affirmative case. If the Court finds and concludes: (1) That the 55 time studies of Elston Division Routes provided an adequate sample of Bowman [fol. 911] store routes for the purpose of developing time standards; (2) that the total cost per route day may be apportioned among store customers on the basis of driver's time; and (3) that the omission of Central Office overhead from the cost studies is not a material defect in those studies, then the Court should find and conclude that the price differences identified on Schedule 1 of the pre-trial order were fully justified by cost differences. (R. 252).

These statements, however, do not stand alone. The second paragraph of the Supplemental Pre-Trial Order (R. 236) expressly made applicable to the order a provision of an earlier order of November 4, 1955 [16] which specified (R. 57–58) that "[t]he introduction of evidence under any and all of said agreements is made without agreement as to the weight of such matters and subject to the objection reserved by the plaintiff * * * that the evidence sought to be introduced is immaterial or irrelevant". Nor can it be argued that this general reservation is inadequate

[16] The later order erroneously refers to the earlier order as having been entered on November 8, 1955.

to protect the government's right to argue the basic invalidity of the cost defense. For the trial judge, at the pre-trial conference held on December 23, 1957, immediately prior to the entry of the pre-trial order, expressly negated any such interpretation of its terms.

At this pre-trial conference the government expressly called attention to the possibility that language in the proposed order might be construed as limiting the government's objections to the underlying theory of the Bowman cost study. Counsel for the government made clear that "the Government wants to reserve the right to raise the legal question as to whether or not Bowman's cost studies are within the scope of the meaning of the section of the Clayton Act" (R. 229), and emphasized that the government had other objections to the cost study besides those specifically referred to in the order (*ibid.*). The court responded "I don't see how you waive it [the right to challenge the legal sufficiency of the cost study under the Clayton Act] by stipulating the cost studies" (*ibid.*). He went on to add "[t]he weight of his testimony is still subject to argument before * * * the Court. All you are saying here is that along with his testimony you want to put into the record the fact that you want to argue the weight of it" (*ibid.*). The government subsequently suggested that a phrase be included indicating that "plaintiff does not concede that the defendant Bowman's cost studies are within the meaning of Section 2A (sic) of the Clayton Act" (R. 230). The court, however, rejected it as "argumentative" since "[a]ll of the facts now being in

the record [you may] argue the weight and the conclusions to be drawn from those facts in your brief" (*ibid.*).

The government subsequently followed this suggested procedure. And the court's decision shows (R. 569–570) that it fully recognized that the government could argue, and was in fact arguing, defects in the Bowman cost study going well beyond the technical objections specified in paragraphs 28 and 31 of the December 23, 1957 Pre-Trial Stipulation.

V.

A SIMPLE DECREE FORBIDDING ANY DIFFERENCE IN PRICE BASED UPON WHETHER A STORE IS INDEPENDENTLY OWNED OR BELONGS TO A CHAIN WOULD EFFECTIVELY REMEDY THE VIOLATION OF SECTION 2(a)

The District Court was incorrect in assuming that an appropriate injunctive decree would require it to "regulate this particular phase of the industry" and would mean that the court "would continually be called upon to pass judgment on the pricing practices of these defendants" (R. 571). As the substance of the government's argument makes clear, the illegal discrimination practiced by Bowman resulted from its use of different price-per-volume schedules for independent and chain grocery stores when in fact this classification of customers necessarily results in unjustifiable discriminatory treatment of a number of customers who deal in an identical way with Bowman. An appropriate decree would forbid the determination of price in terms unrelated to the cost of dealing with the particular customer. Tailored to the

present case, the necessary decree would simply enjoin the respondent from adopting or giving effect to any price or discount policy based upon a classification of its customers into chain stores or independent stores.

CONCLUSION

For the foregoing reasons the judgment of the court below should be reversed and the case remanded to the district court with instructions to enter a judgment holding the appellee Bowman Dairy Company to have violated Section 2 of the Clayton Act in its price discount practices and policies which were the subject of the hearing on remand, and enjoining Bowman from adopting any price or discount policies based upon a classification of its customers into chains and independents.

Respectfully submitted.

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